78-1669

No.

In the

Supreme Court of the United States

October Term, 1978

ANTHONY FOX,
DALE KREMSREITER,
MICHAEL SCHEDLBAUER,
JOHN LUEDTKE and
MARTIN DETTERMING, for and in
behalf of themselves and other
employees similarly situated,

Petitioners,

vs.

GENERAL TELEPHONE COMPANY
OF WISCONSIN, A Wisconsin Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

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GENERAL TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

PETITIONERS, 42 employees of the respondent General Telephone Company of Wisconsin, a subsidiary of General Telephone and Electronics, (GTE) pray that a Writ of Certiorari issued to review the decision of the Wisconsin Court of Appeals, District III, entered on October 13, 1978. The Order of the Wisconsin Supreme Court dated January 16, 1979, denied petitioners an appeal and review of said Court of Appeals decision.

(MR. JUSTICE STEVENS, on April 10, 1979, signed an order extending petitioners' time to file this petition to May 16, 1979.)

DECISION BELOW

Decision of the Wisconsin Court of Appeals, District III has been reported in *Fox vs. General Telephone Company.* 85 Wis. 2d 698, 271 N.W. 2d, 161. It appears herein as Exhibit 1, Appendix.

JURISDICTION OF THIS COURT

The appellants petition to the Wisconsin Supreme Court to appeal and review the decision of the Court of Appeals was timely made and said Order of the Court of last resort in Wisconsin denying the same appears as Exhibit #2 herein.

(The Wisconsin Appeals Court began operating as of August 1, 1978, and pursuant to law, the petitioners' appeal which was originally filed in the Wisconsin Supreme Court as Case No. 77-362, was transferred to the Court of Appeals in District III for decision.)

This court has jurisdiction under 28 U.S.C. Sec. 1257 and Rule 19 to review said decision of the Wisconsin Appeals Court which has interrupted and decided a Federal question under the *Fair Labor Standards Act*, 29 U.S.C.A. Sec. 206, 207, 216 and 203, and the related Portal to Portal Act, 29 U.S.C.A. Sec. 254 involving the petitioners' work activity.

QUESTIONS INVOLVED

1. Is the petitioners' driving of GTE trucks, with company equipment and supplies without which they cannot work, on interim weekends between their designated reporting center, (that exchange to which the employee is permanently assigned — the home base company garage) and a job site located in another exchange area, compensable work time within the meaning of the Fair Labor Standards Act?

2. Does the express travel time provision, in the contract between the CWA* and GTE, Article III, Sec. 1:

> "Time worked shall be considered to include travel time from the designated reporting center to the job and travel time returning to the designated reporting center."

make the interim weekend driving time by the petitioners compensable under 29 U.S.C.A. 254 (b) of the Portal to Portal Act?

*Communication Workers of America

3. Not withstanding any other argument, Does the revised sec. 4 of the 1974 contract make petitioners driving time compensable under 254(b) as Chauffeurs as GTE is required to provide transportation?

NOTE: All issues raised herein were raised by Petitioners in Court of Appeals.

APPLICABLE STATUTES

29 U.S.C.A. Section 216:

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violated the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.***

29 U.S.C.A. Section 207: maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed;

29 U.S.C.A. — 203: Definitions

As used in this chapter

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(g) "Employ" includes to suffer or permit work.

29 U.S.C.A. Section 254:

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either —

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

STATEMENT OF THE CASE

This is an action for recovery of unpaid wages for travel time on interim weekends based upon the Fair Labor Standards Act, (29 U.S.C.A. sec. 216 and 207) and upon Article III of the collective-bargaining agreement dated January 27, 1974. There are forty-two petitioners, similarly situated, who have filed wage claims for driving a company vehicle assigned to him between the job site and his designated reporting center (home base - company garage).

In the early 1970's, defendant, a division of General Telephone and Electronics Company, commonly known as GTE, undertook a major updating and replacement of its telephone equipment in Wisconsin. The upgrading of its facilities including changing eight party lines to four party lines, central office equipment replacement, cable replacement among others, primarily in smaller or rural communities in the Northern and Central areas of Wisconsin. In order to upgrade the service in these outlying areas, GTE had to rely on and use part of the work force, trucks, and equipment maintained at its major service centers (the designated reporting center of the employees.) The designated reporting center is the exchange or center to which the employee is permanently assigned.

EMPLOYEES TRUCK AND EQUIPMENT

Each of the employees is assigned the use of a specific truck containing tools and equipment to enable him to perform his work. (R. 76-77, *App. Ex. 3*)

Each of the petitioners is responsible for the truck and equipment assigned to him. (R. 531-2, *App. Ex. 3*)

Each of the petitioners is subject to the GTE supervision and control at all times, while driving said truck. (R. 146-149)

Each of the petitioners is subject to GTE safety rules and disciplinary action for infraction that occurs while driving said truck including dismissal from employment. (R. 155-8)

Each of the petitioners is covered by GTE Workman's Compensation and liability insurance.

COLLECTIVE BARGAINING AGREEMENT

Each petitioner is a member of the Communication Workers of America (CWA) Union and are paid wages, travel time, board and lodging and other benefits in accordance with the contract with GTE.

Prior to 1/27/74, a petitioner who was assigned to a work area away from his homebase for a period of weeks, (e.g. Fox assigned to the Rice Lake area for six weeks; travel time, 2½ hours.) was paid wages for driving his truck between Wausau and Rice Lake on the interim weekends. In other words, he would leave Wausau on Monday morning at 8:00 am (his starting time) and return to Wausau on Friday afternoon, 2½ hr. before his quitting time (4:30 pm). During the week, Monday through Thursday nights, he received board and lodging allowance.

1974 CONTRACT — TRAVEL TIME PROVISIONS

On 1/27/74, a new contract was signed between CWA and GTE. Article III of the old and new agreements, is shown on the following page.

GTE requested and drafted the 1974 revision of sec. 4.

ARTICLE III OF AGREEMENT DATED 3/9/73

TRAVEL TIME

SECTION 1. Time worked shall be considered to include travel time from the designated reporting center to the job and travel time returning to the designated reporting center.

SECTION 2. When an employee travels from one job location to another in a conveyance supplied by the Company, such travel time will be considered to be the same as productive work time.

SECTION 3. When an employee travels from one job location to another on a public conveyance, travel time outside of the normal scheduled hours generally will not be paid for; however, the Company will pay certain board and lodging expenses incurred by the employee during such travel time.

SECTION 4. Employees traveling to Company schools within the operating area of the Company will travel on Company time for the initial trip to the school and the last trip from the school.

ARTICLE III OF AGREEMENT DATED 1/27/74

TRAVEL TIME

Sections 1, 2 & 3 remain the same. However, Section 4 was changed to read as follows:

SECTION 4. Employees traveling to Company schools or a job site within the operating area of the Company will travel on Company time for the initial trip to the school or job site and the last trip from the school or the job site. Transportation will be provided by the Company for the interim weekend(s) unless the employee has elected the reimbursement option provided in Article XXIII, Section 1(b).* Employees will travel on their own time and expense.

*NOTE: The reimbursement option (per diem) is not involved in any of the Plaintiffs' claims. Rec. p. 85

There is no dispute that the phrases "time worked," and "Company Time" as used in the contract are the same as "productive work time."

(R. 426)

Rec. p. 430-1 Mr. Kolb

Q. You're also aware, in 1974, when you were negotiating or preparing the language for the new contract, that Section 4, as it appeared in the 1972-1973 contract, Section 4 under "Travel Time," that that only related to the school at Portage?

A. That's correct.

Q. And it is also true, is it not, Mr. Kolb, that when the employee is assigned, or was assigned to the school at Portage, that if he was there for several weeks, that that was also considered his job site for the period that he was at Portage?

A. I think you could call it his job site.

Mr. Steffen, the local union president, testified that there were 2 meetings held before ratification. At the first meeting some of the employees questioned whether the new language affected their interim weekend driving. Mr. Steffen contacted the CWA bargaining committee and was advised that the revised section 4 *only* applied to company school travel. Steffen's uncontroverted testimony is this information, "*** was coming from the company." (R. 448)

In March of 1974, even the Company supervisors did not apply the revised Section 4 to plaintiff's interim weekend travel. This prompted a letter from Mr. Benjamin (former personnel director) of GTE to his Supervisors clarifying the company's interpretation of the revised Section 4 in which he states: (R. 424)

> "We recognize there may have been some errors in communication previous to this advice regarding this change in agreement terminology."

GTE POSITION ON TRAVEL TIME AFTER MARCH, 1974

After March, 1974, GTE only paid for the first and last trip between the employee designated reporting center (homebase) and job site, and did not pay for the interim weekend trips. Under the new GTE directive, the board and lodging allowance, Monday through Thursday remained the same with no board or lodging provided Friday, Saturday, or Sunday. However, the employee, on Friday on an interim weekend, would have to leave at the end of his workday (4:30 pm) and drive the Company truck to his designated reporting center. The employee had to leave immediately after 4:30 pm. No other "transportation" was provided. (R. 146). He was obliged to comply with all Company safety rules and regulations, and subject to disciplinary and discharge action for noncompliance while driving said truck. (R. 155-7) He further had to return the truck to the Company garage at his homebase. On Monday morning, he was *required* to pick up his truck at the homebase and drive to the work area before 8:00 am, his normal starting time. He could not return without his truck! On this subject, Mr. Kolb, a GTE personnel director, and Mr. Gajewski, the GTE foreman testified as follows:

(Record page 443 Mr. Kolb's testimony)

Q It is true, is it not, Mr. Kolb, that each of the employees, while driving the company truck on the interim weekends, would be obligated to comply with the company's safety rules and regulations?

A Yes, they would.

Q It is also true that each of the employees could not take the company truck home?

A That's right.

Q That the company truck would have to be returned to the company garage — the designated company garage?

A Yes.

Q Isn't it also true that while the truck was at the company garage during the weekend, that it would be available for greasing and oiling and cleaning, and so forth?

A I'm sure that it would be available for that.

Q And isn't it also true that the employee would be required to report to the company garage on Monday morning and pick up his truck to drive to the work site on interim weekends?

A Yes, he would.

RESTOCKING AT WAUSAU

The petitioners routinely picked up supplies in a "plastic bag" at the Wausau Garage on Monday morning on their return to the job site. Also:

> "We were informed copper, any old phones, or ringers were to be returned to Wausau on Friday evening." (R. 545, *App. Ex. 3)*

[See also testimony of Karau — Rec. 542; Schedlbauer — (R. 536-539); Kremsreiter — (R. 531-4), Fox — (R. 76-77 *App. Ex. 3*)]

The petitioners all testified the practice of washing, gassing, and resupplying their trucks remained the same after 1/27/74.

(Rec. 147, Mr. Gajewski, GTE foreman)

Q Did the employee have to return the truck immediately after the end of his work day to Wausau?

A Well, he could say at 4:30 if he wanted to go eat or have a cup of coffee or something, he could do that.

Q But other than the time alloted for his meals or rest period, he would have been required to return the truck at the end of the day to the Wausau garage?

A Yes.

Q That's on the interim weekend?

A That's correct.

(Record Rec. 158-9) Mr. Gajewski)

Q You said before that the employee would have to pick up his truck on Monday morning and return to the job site?

A On his interim weekend, if he drove his truck down, yes, sir.

Q And that is because the truck was needed in order to perform his job function at the job site?

A Well, that was his decision to use.

Q You are not answering my question. But the reason he was required to pick up his truck and return it to Eagle River was because the truck was assigned to him, it was necessary for him to use in the performance of his work duties.

A Yes, sir.

Q In other words, it had all the equipment that he normally would use in the performance of his work duties?

A That's right.

Q And he was responsible for the equipment in the truck?

A Yes, sir.

DRIVING RESPONSIBILITIES AFTER 1974

The driving work responsibilities remain the same after 1974 for all the plaintiffs. The *only* change was not in the work practice, but *when* the driving took place. Mr. Kolb agreed both the assigned work truck and its equipment and material were necessary for plaintiffs to perform their job function.

ALL PETITIONERS SIMILARLY SITUATED

All of the petitioners have filed consents to be a party to the suit — all being similarly situated. Each wage claim received in evidence represented a claim for driving a company vehicle between the job site and the employee's designated reporting center (home base - company garage) — a trip of 3 hrs. or less where GTE did not authorize lodging on the week end. The total wage claims exceed $37,000.

REASONS FOR GRANTING THE WRIT

I. WISCONSIN DECISION THWARTS NATIONAL PURPOSE OF FAIR LABOR STANDARDS ACT IN APPLYING *SOME BENEFIT* RULE.

This appeal involves an important question under both the Fair Labor Standards Act and the related Portal to Portal act. The last major pronouncement on these acts by this court was in 1956, *Steiner v Mitchell* 350 US 247, 76 S.CT. 330. Since 1956 there has been a case by case analysis and development of the law in the lower Federal courts.

In 1958, the 10th Circuit, in *D A & S Oil Well Servicing, Inc. v Mitchell,* 262 F 2d 552 applied the *"integral and indispensable"* rule to the driving of pickups used to transport necessary equipment, as being part of the principal activities of the employee. In *Smith v Superior Casing Crews,* 299 F. Supp. 725, (1969) (E.D.La) the court applied the supervision and control rule, i.e., "whether or not the employee is under the supervision, direction, or control of the employer at the time of the activity."

In 1974, the 1st Circuit, in *Secretary of Labor v Field, Inc.,* 495 F. 2nd 749, held travel time compensable applying the rule of *"any work of consequence performed by an employee."* citing 29 C.F.R. Sec. 790.8 (a). stating:

p. 751 "... It is irrelevant that Audet and the other employees might have reached the jobsite by personal transportation or that the employer might have stocked the jobsite without the use of the trucks. The activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee. "(T)he crutial question is not whether the work was voluntary but rather whether the (employee) was in fact performing services for the benefit of the employer with the knowledge and approval of the employer."

The court also indicated in a footnote the benefit to the company under circumstances where the employee may be rendering services as a *chauffeur.* The 1st Circuit explicitly refused to follow the rule in *Tanaka v Richards K.W. Tom,* 299 F. Supp. 732 (D.C. Hawaii, 1969).

Recently the 5th Circuit, in *Dunlop v City Electric, Inc.,* 527 F. 2nd, 394 (1976), applied the *"no benefit to the company"* rule stating:

p. 398 "This directive to construe liberally the terms 'principal activity or activities' to encompass 'any work of consequence' was reiterated by the President in his Message to Congress on Approval of the Portal-to-Portal Act and has been followed by the majority of courts interpreting the two statutes. Decisions construing the Portal-to-Portal Act in conjunction with the F.L.S.A. make clear that the excepting language of

#4 was intended to exclude from F.L.S.A. converage only those activities *'predominantly ... spent in (the employees') own interests.' Jackson v Air Reduction Co.,* 6 Cir. 1968, 402 F. 2d, 521, 523. *No benefit may inure to the company. Blum v. Great Lakes Carbon Corp.,* 5 Cir. 1969, 418 F. 2d 283, 287. The activities must be undertaken *'for (the employees') own convenience,* not being required by the employer and not being necessary for the performance of their duties for the employer.' *Mitchell v Southeastern Carbon Paper Company,* 5 Cir., 1955, 228 F. 2d 934." (emphasis added).

THE WISCONSIN SOME BENEFIT RULE

The Wisconsin Appeals Court *misapplied and misinterpreted* the *Dunlop* case and the policy behind the F.L.S.A. by stating that the *Dunlop Court, (App. Ex. 1, p. 5a)*

> "clearly recognized the principle that an employer may receive some benefit and an employee still not be entitled to compensation under the Act."

The above commentary is directly contrary to the stated purposes of the F.L.S.A. as set forth in *Dunlop.*

Also, the Wisconsin Court not only relied on the more conservative *Tanaka* rule, but misapplied that case. In *Tanaka* the employee (1). was not required to report to the employer's yard, (2). could take the vehicle home if he so desired, and (3). the vehicles were solely used for transportation and contained no equipment. Of greater significance, the Wisconsin Court completely ignored the *control or direction* rule in *Smith,* supra.

As this court is aware, this country went through a severe economic recession in 1974. Employers were scrambling to find ways of cutting expenses. In the class struggle, it does not seem unreasonable that, management, in an endeavor to cut back on costs, attempted to "pigeon-hole" the travel activity of the petitioners into the *Tanaka* case.

This is a resounding case where GTE, having to use its equipment and labor force in the Wausau area to update its facilities in outlying areas, not only had the benefit of having

its trucks back in Wausau on the weekends for emergency service, reassignment, for repairs, gassing, washing, etc. but avoided paying the employees any transportation expenses or providing a chauffeur to them for that purpose.

II. THE WISCONSIN DECISION IGNORES THE EXPRESS PROVISIONS OF SEC. 1 CONTRARY TO 29 U.S.C. 254(b).

Article III, Section 1 of the employment contract EXPRESSLY states:

"TIME WORKED SHALL BE CONSIDERED TO INCLUDE TRAVEL TIME FROM THE DESIGNATED REPORTING CENTER TO THE JOB AND TRAVEL TIME RETURNING TO THE DESIGNATED REPORTING CENTER."

The words of the contract are clear and unambiguously expressive of the GTE contract obligation.

Wisconsin Decision Contrary to Law

The Wisconsin court concluded that the revised Sec. 4 of the 1974 contract as prepared and proposed by GTE, changed Sec. 1 in "plain and unambiguous" terms. This legal conclusion is contrary law!

> "Where changes in the language of a contract are requested by one party *ANY* possible ambiguity must be resolved *against the party requesting the change. Hoffman v Pfingston,* (1951) 260 Wis. 160, 50 N.W. 2d 369, Restatement 2 Contracts, p. 973 Sec. 505, (emphasis added). See also *Wisconsin Employment Rel. Bd. v Gateway Glass,* 60 NW 2d, 768, 770, 265 Wis. 114, (1953).

This rule governed GTE in 1974. It's duty was to avoid any possible ambiguity — *a greater burden* than mere plain terms usage. To permit GTE to use Sec. 4 to exclude payment of interim week-end travel to the plaintiffs would be a subterfuge, for:

(a) Section 4 makes *no mention* whatsoever of travel between the *designated reporting center and the job.*

(b) The prior Section 4 *did not provide* transportation to and from the school and the *employee's home* on interim week-ends. The natural employee interpretation is that this change increased transportation expenses — not a forfeiture of benefits.

The practice prior to 1974 was that petitioners' interim weekend driving time was work time. Now GTE not only argues that revised sec. 4 changed sec 1, BUT the *prior practice* which is compensable under 29 U.S.C. 254(b) (2). In *Harmon v Martin Bros. Container & Timber Products Corp.* 227 F. Supp. 9 (D.C. Or.) the court allowed travel pay where for 5 years the employees had been paid under practical interpretation of bargaining agreement. Here, Petitioners had been paid for their travel time since the early 70's.

In view of the past driving time practice, and an employee's desire to have increased school travel expenses (particularly where GTE admits that the school was also considered the employee's job site), compounded by the fact that Sec. 4 makes no reference to a designated reporting center or Sec. 1, the conflict or ambiguity should have been readily apparent to GTE.

Thus the law places a heavy duty on the drafter of *change* in contract language to avoid *any ambiguity.* Consequently, GTE's failure to explain that the new language was intended to take away wage benefits, which it had previously paid by practice and contract, estop it from so arguing now. The 7th Cir., in *Schwerman Trucking Co. v Gartland Steamship Co.* 496 F. 2d. 466 (1974) in a Wisconsin case, stated, 475:

> ... Also, where different interpretations are possible, the preferred interpretation is that which is against the party who prepared the instrument.

GTE DUTY TO EXPLAIN

As a matter of law and in the interest of fairplay GTE had the *absolute duty* to inform the petitioners that they would be losing substantial driving time travel pay under the new sec. 4. Again, the lower court erred in ruling to the contrary.

As the President's message to Congress on the Portal to Portal passage (cited in *Dunlop,* supra, in a footnote, p. 398) stated:

> ... I am sure the courts will not permit employers to use artificial devices such as the shifting of work to the beginning or the end of the day to avoid liability under the law.

III. APPEALS COURT ERRED IN NOT FINDING THAT THE REVISED SEC. 4 OF THE 1974 CONTRACT MADE PETITIONERS DRIVING TIME COMPENSABLE AS CHAUFFEURS.

IF it is determined that interim weekend travel time is not work time under Sec. 1 of Art. III, and IF it is further determined the driving is work of no benefit or defacto, a part of the regular or principal employment), THEN the question remains: IS the driving compensable under 254 (b) since under Sec. 4 Art. III of the contract, because the company must provide transportation?

The plaintiffs submit that the word *transportation* is not equated with the word vehicle; that GTE must not only provide a vehicle but a driver *to transport* the plaintiffs on the interim weekend. Consequently the petitioners were performing services as a "chauffeur." GTE had to provide both driver and vehicle.

Consequently, even granting the GTE interpretation of Sec. 4, the interim weekend "driving time" is compensable under 254 (b). See *FIELD,* supra p. 752.

CONCLUSION

For the above reasons petitioners prayer for a Writ should be granted.

Respectfully Submitted

Larry W. Rader
Attorney for Petitioners

APPENDIX

EXHIBIT I

77-362

STATE OF WISCONSIN : IN COURT OF APPEALS
DISTRICT III

ANTHONY FOX,
DALE KREMSTREITER,
MICHAEL SCHEDLBAUER,
JOHN LUEDTKE and
MARTIN DETTERMING, for and
in behalf of themselves and other
employees similarly situated,
Plaintiffs-Appellants,

v.

GENERAL
TELEPHONE COMPANY
OF WISCONSIN,
a Wisconsin Corporation,
Defendent-Respondent.

APPEAL from a judgment of the circuit court for Marathon County, the Hon. Howard Latton, presiding, dismissing the plaintiffs' complaint following trial to the court.

Affirmed.
BEFORE Dean, P. J., Donlin, J. and Foley, J.
FOLEY, J.

Plaintiffs are forty-two employees of defendant, General Telephone Company, all of whom were subject to a collective bargaining agreement between the company and Communication Workers of America (CWA). They commenced this action for back wages for travel time in company trucks on interim weekends to and from the Wausau garage and outlying job sites.[1] Their claim is based on the terms of the collective bargaining agreement and on the provisions of the Fair Labor Standards Act. The trial court found the plaintiffs were not entitled to compensation for such travel time either under the contract or the terms of the FLSA.

The collective bargaining agreement dated January 24, 1974, which governs this dispute, provided:

TRAVEL TIME

> Sec. 1. Time worked shall be considered to include travel time from the designated reporting center to the job and travel time returning to the designated reporting center.
>
> Sec. 4. Employees traveling to Company schools or a job site within the operating area of the Company will travel on Company time for the initial trip to the school or job site and the last trip from the school or job site. Transportation will be provided by the Company for the interim weekend(s) unless the employee has elected the reimbursement option provided in Article XXIII, Section 1 (b). Employees will travel on their own time and expense.

The language of Sec. 4 was changed by this agreement. It previously read:

> Sec. 4. Employees traveling to Company schools within the operating area of the Company will travel on Company time for the initial trip to the school and the last trip from the school.

Plaintiffs argue they should be paid for interim weekend travel time under Sec. 1 regardless of Sec. 4. They claim the agreement is ambiguous and subject to the interpretation that it left the previous travel time agreement unchanged. They also argue it would be a "subterfuge" to use Sec. 4 to exclude payment because the employees did not understand what the agreement said and thought they would be paid for interim weekend travel time. *This argument incorrectly assumes that there is some duty on the employer to make sure the employees, represented by CWA, understood what the agreement meant.*

We find that Sec. 4 specifically changed the former agreement in plain and unambiguous terms. It is our duty to construe the agreement as it stands giving effect to the plain meaning of the language used.[2] The change in Sec. 4 of the 1974 agreement provides employees will travel on their own time. Travel time to and from job sites on interim weekends is therefore not compensable under the collective bargaining agreement. As to the "subterfuge" charge, the trial court found plaintiffs had not met the burden of proof necessary to estop the company from using Sec. 4 to deny travel time payments. This finding is not clearly erroneous and contrary to the great weight and clear preponderence of the evidence and therefore must be sustained on appeal.[3]

It is conceded, however, that if the provisions of the collective bargaining agreement are in conflict with the FLSA, the Act controls. The FLSA requires time and one-half for work over 40 hours per week with certain activities being excluded. The exclusion, 29 USCA Section 254 provides:

> (a) ... (No) employer shall be subject to any liability or punishment under the Fair Labor Standards Act ... on account of the failure of such employer to pay an employee ... overtime compensation, for or on account of any of the following activities of such employee ...:
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

> (2) activities which are preliminary to or post-preliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

In considering these exclusions, the United States Supreme Court stated in *Steiner v. Mitchell,* 350 U.S. 247, (1956) that they were not intended to deprive employees of the benefits of the FLSA for activities performed before and after regular hours of work where the activities were an integral part of and indispensable to their principal activities.

In *DA&S Oil Well Servicing, Inc. v. Mitchell,* 262 F. 2d 552 (10th Cir. 158), the court recognized the difficulty in fixing any definite standard for determining what activities of an employee performed before and after hours of work were an integral part of and indispensable to his principal activities. The court concluded that each case must be decided upon its particular facts. The court then held compensable the driving of trucks to and from job sites because they carried equipment without which the principal activity could not be performed. The court added, however, that if the trucks were used solely for the transportation of employees to and from the principal place of work, then the employees would be "riding or traveling" within the exclusion.

Thus, the *DA&S* case makes clear that where the time spent is solely for the benefit of the employees, the exclusion applies. The question not answered is whether the exclusion can apply if there is any benefit to the company, no matter how small.

In *Dunlop v. City Electric, Inc.,* 527 F. 2d 394 (5th Cir. 1976), the court addressed this question. The trial court in *Dunlop* had found some of the employee activities included within the definition of "principal activity" and the others not. It concluded that the time spent on activities within the definition were minimal. Relying on prior case law defining principal activity as "any work of consequence performed for an employer," the trial court concluded that the work required so little employee time as to be *de minimis* and therefore not compensable. It was not work of consequence.

The work involved in *Dunlop* included filling out daily time, material, supply, and cash requisition sheets; checking job locations; removal of trash from trucks accumulated the previous day; loading of trucks with the materials needed for the day's jobs; fueling trucks; and picking up plans for the day's jobs. The court on appeal construed the term "principal activity" liberally and found all of these activities included within the definition of "principal activity." Also, all clearly provided a benefit to the employer. The court then remanded the case to the trial court for further consideration of whether all of the activities required so little time as to be *de minimis*. By this remand, the court clearly recognized the principle that an employer may receive some benefit and an employee still not be entitled to compensation under the Act.

In the instant case the employees claim relies substantially on the fact they provided a number of benefits to the company by driving company trucks back and forth between the Wausau garage and outlying job sites. Bags of supplies left in the trucks during interim weekends while the trucks were parked at the Wausau garage were taken to job sites on Monday mornings. Trucks were on occasions gassed or washed by other employees during the interim weekends. If repairs were needed on trucks brought in on Friday afternoon, another truck would be taken on Monday morning. Sometimes waste that could not be disposed of at the job site would be returned in the trucks and would be unloaded over the weekend. Also, the trucks used by the employees contained equipment necessary to the employee's work at the job site.

Many of these activities, such as the washing or gassing of the trucks, required no time expenditure by the employes. In this respect, they differ from the activities considered in *Dunlop*. Still, some benefit was realized by the company as a result of having the trucks at the Wausau garage so they could be washed or gassed. However, employer benefit, not requiring any employee time, would not under *Dunlop* make the preceding travel time compensable. Benefit to the company, therefore, is not the sole consideration in determining compensability. To be compensable, the test is whether there was "work of consequence" performed "for the employer."

In this case the only work which conceivably was of consequence and performed for the employer was the transportation of the trucks from one location to another. The amount of time consumed in performing any of the other tasks such as removing waste from the trucks is not established in the record. However, it is clear that such time would be *de minimis* and would not qualify as work of consequence. Regarding the transportation of the trucks, the trial court found this to be of no benefit to the company. This finding was based on the fact the trucks and equipment would have remained at the job sites following the initial trip had they not been used for the sole convenience of the employees in traveling back and forth. Additionally, the employees were not required to drive the trucks and could elect to travel in their personal vehicles. The trial court further found that the driving of the trucks was not motivated by any company purpose except the fulfillment of the company provided travel requirement in the collective bargaining agreement.

The driving of the trucks was therefore not an integral part of or indispensable to the principal activity or activities of the employees. These findings are not clearly erroneous and against the great weight and clear preponderance of the evidence. On the basis of such findings, the riding or traveling on interim weekends is within the exception to the payment requirements of the Fair Labor Standards Act.[4]

At oral arguments plaintiffs cited two additional cases, *Secretary of Labor, U.S. Dept. of Labor v. E. R. Field, Inc.*, 495 F2d 749 (1974), and *Marshall v. R&M Erectors, Inc.*, 429 F. Supp. 771 (1977). The *Field* case is distinguishable because there was a finding that the essential purpose of the travel in company trucks was to transport tools and supplies to various job sites. The *Marshall* case held that where "work of consequence" is performed before travel commences the travel becomes subject to overtime pay. No doubt the same would be true where "work of consequence" was performed after the travel. However, the record in the instant case does not show any such "work of consequence."

The conclusion of the trial court that the travel of the plaintiff employees on interim weekends in company vehicles constituted "riding or traveling" to and from the actual place of

performance of their principal activity or activities which they were employed to perform within the meaning of 29 USCA 254 (a), and that such travel time was not compensable, is not clearly erroneous and against the great weight and clear preponderance of the evidence.

By the Court: Judgment affirmed.
Recommendation: Publication.

APPENDIX

1 An "interim weekend" is a weekend between work weeks following the first trip to and last trip from a job site away from the Wausau headquarters.

2 *Hanz Trucking, Inc. v. Harris Bros. Co., Crestline Division*, 29 Wis. 2d 254, 138 N.W. 2d 238 (1965).

3 *Stevens Construction Corp. v. Carolina Corp.*, 63 Wis. 2d 342, 217 N.W. 2d 291 (1974).

4 In the case of *Tanaka v. Richard K. W. Tom, Inc.*, 299 F. Supp. 732 (D.C. Hawaii, 1969), a case similar on its facts to the instant case, the riding or traveling was also found to be within the exclusion.

EXHIBIT 2

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, January 16, 1979

To:
Larry W. Rader
500 Third Street
Suite 605
Wausau, WI 54401

From:
Axley, Brynelson, Herrick & Gehl
122 West Washington Avenue
Madison, WI 53703

The court today announced an order in your case as follows:

No. 77-362 — *Anthony Fox, et al. v. General Telephone Company of Wisconsin, a Wisconsin corporation*

The court having considered the appellants' petition to appeal pursuant to sec. 808.10 and Rule 809.62,

IT IS ORDERED the petition is denied.

Marilyn L. Graves
Clerk of Supreme Court

EXHIBIT 3.
EXCERPTS OF PETITIONERS
TESTIMONY ON WORK ACTIVITY

SUMMARY OF TESTIMONY
(Only Pertinent Parts Summarized)

RECORD PAGE

Between Shown Record Pages
Anthony Fox Testified as Follows:

69 DIRECT EXAMINATION BY MR. RADER:

My name is Anthony Fox, I live at Route #3, Wausau and I am presently an I & R Installer. During the period in question I was a Central Office Installer for General Telephone Company. I have been employed for GTE for 8½ years. My job consists principally of installing Central Office switching equipment and exchanges, carrier equipment between one exchange and another including repeater lines. My designated headquarters, or home base, was Wausau and I operated out of the Wausau garage. During the early 1970's there was a program by GTE to upgrade facilities in Wausau and the northern area of the state which included converting over to all four-party lines or less including single or two-party lines. I believe this was done pursuant to an order of the Public Service Commission. This change-over started in early 1969. Basically the work force from Wausau was dispatched to service the outlying area change-over. The work force from Wausau was used to perform change-overs in Woodruff, Eagle River, Rice Lake, Antigo, and Rhinelander. In other words, the North Central area of the state. Prior to 1/27/74, the plaintiffs were paid wages in accordance with a contract between GTE and our union, CWA, and when we were assigned to an area such as Rice Lake prior to 1/27/74 say for a period of 6 to 8 weeks I would report at 8:00 a.m. to the Wausau garage to pick up the equipment needed for the job, drive to the job site in an assigned truck where the truck contained equipment to perform my duties including personal tools, screwdrivers, wrenches, a large toolbox, various testing gear, spare equipment, and replacement equipment. Most of our jobs consisted of equipment in one exchange and equipment in another exchange what we call repeater lines connecting the two exchanges. We installed equipment in both exchanges. We install equipment on the repeater line, and we're expected to test all of the equipment so I would be using the truck to drive back and forth from the exchanges, haul the equipment, install the equipment, and for testing of the repeater line. The testing equipment did stay with the truck.

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73 Prior to 1/27/74, I was paid wages starting at the time I reported to the Wausau Garage. In other words, I was paid for my driving time to Rice Lake. Also I returned to Wausau on Friday on company time. We returned and were expected to be at the garage at 4:30 where I returned the truck and its equipment to the Wausau Garage. We were expected to keep our trucks clean - washed, gas tanks full, make sure the oil was changed and other maintenance as required. I believe this work was done at the company garage on a Saturday shift or in the evening. On January 27, 1974, a new contract was entered into between CWA and GTE, and after the contract was entered into, I was informed by GTE personnel that I would now travel on my own time and expense. I was directed to take a truck to the job site at Rice Lake. As far the equipment, the tools and the practice, my responsibility remained the same after 1/27/74 as it had been prior to that day. Now
76 after 1/27/74, I was directed to return the truck and equipment that was assigned to me each Friday to the Wausau Garage.

Exhibit #21 is a wage claim which represents weekend travel in which I drove the truck between the job site and the Wausau Garage. On Monday morning, depending on where I was assigned, immediately after the new contract I was working in Stone Lake, Spring Brook or the Rice Lake area I had to be at the garage by 5:30 which would permit me to be at the job site at the start of my work day, 8:00 a.m. When I reported to the Wausau Garage, I had to make sure that I had all the equipment I needed, test gear had to be checked out, and if we needed particular testing equipment, I'd have to check that out and make sure I had my complete set of tools to do the job for the required week. After 1/27/74 I was told that it was my responsibility to make sure that the truck and equipment got to the job site. as I ordinarily worked myself there was no way I could take
77 my personal vehicle. I had to take the company van so I had my equipment. I was never authorized any mileage for driving my personal vehicle on interim weekends. I was told that mileage was not paid for personal vehicles as long as there was a company vehicle available. With (Emphasis added)

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SUBSECTION (d) TO INTRODUCE PARTS IN CLARIFICATION AT THE TIME THE PLAINTIFFS READ THAT PARTS OF MR. GAJEWSKI'S DEPOSITION ADVERSELY INTO THE RECORD.

REBUTTAL BY PLAINTIFFS

530 Dale Kremsreiter recalled: I was an installer during the entire period covered by my wage claim and Mr. Gajewski was my foreman for the complete period in question. There may have been a time when I was on loan to another supervisor for a short period or a couple of days. On interim weekends the resupplying of our trucks was done this way. Our trucks are
531 originally stocked out of the supply location in Wausau, and when we go to an out-of-town area, if it's a major conversion, say such as Lac du Flambeau, they do have a supply center and there are some supplies brought in there. But, we're still responsible as individuals to supply our truck and keep it stocked to the company specifications, and to do this we're still required to fill out individual supply sheets and either turn them into Mr. Gajewski, who many times sent them into Wausau with a courier or something, or we would use some other means of notifying supply of the items needed, and on Monday mornings when we went in to pick up our vehicle, there would be either a big plastic bag -- looked like a big garbage bag -- or a box, or just a stack of supplies with our truck number, or our specific number. Like at present, my number is 108, which would be on this, and we would put that in our vehicle and go to the job site. Accessories such as screws and minor items were considered a truck stock and these type of items were items that we, as individuals would order and those items we would pick up Monday mornings in a sack with either our truck number or our employee number on them, put them in our vehicle, and commence
532 towards the job site. Very often on Friday when we left the job site there would be a lot of old refuse - old wire - and other items of discard, and when we would get in on Friday evening we would unload the truck -- there are big garbage bins in the Wausau area where we parked our vehicles -- or Monday morning before we went to our job site, because Mr. Gajewski was very strick on keeping good housekeeping. I supervised the filing of the claims and reviewed all the records which are in the three boxes in court. I spent many hours doing that and the records, which GTE had provided, cover each employee for the period

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533 1974 to 1976, and I reviewed each of those records. To the best of my ability I saw to it that the employee filled out the exhibit and followed the general format. When we filled out the claim, the particular interim weekend when there would have been an employee on per diem, this was not put on the claim. If it is, it may have been a mistake, and then we did remove it. This is not the case. The time sheets would clearly have stated if we had a code 96 on Friday evening of an interim weekend - a code 96 makes reference to the per diem allowance - and those were not put on the claim. All claims involve a situation where the employee was receiving board and lodging during the week. There
534 were very many instances, if our truck did require some maintenance and there was another vehicle in the garage from another member of the crew that may be temporarily assigned to -- like at the times we had some working in the assignment department -- where we would return on our own time on Friday evening, leave our vehicle at the garage for servicing during the week, and return with a different truck Monday morning. We would change our tools either Friday evening or Monday morning - our personal tools like climing equipment and toolboxes - and return to the job site with a different vehicle. I was not reprimanded for not bringing the truck back on interim weekends, but I got a reprimand for arriving at the job site late on a Monday morning, about 10 or 15 minutes. I was told not to let it happen again and I told Mr. Gajewski that it was quite a long drive and I preferred to have my own personal vehicle under the road conditions, and I said, "If this is the case, if I'm going to get chewed out for coming late on Monday mornings, I would like to use my own vehicle and not use my company vehicle," and he said, "No, if you don't use your company vehicle to return to the job site you may as well not return either."

NO CROSS EXAMINATION.

536 MICHAEL SCHEDLBAUER RECALLED. DIRECT EXAMINATION BY MR. RADER.

During 1974 through 1976 we would drive back and forth on our own time on the interim weekends. There were many times when we were in a remote area where there wasn't a lot of facilities to dispose of junk wire, say, and general garbage, and we were expected -- our supervisor, who at that time was Mr. Gajewski, who is a very firm believer in good housekeeping - says always keep your area

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537 cleaned up and that - and most weekends we brought back, well, stuff that there really wasn't a convenient place to dispose of up there. Also with respect to supplies, on a major job they set up a supply depot, or whatever you want to call it, where they ordered the major supplies for the jobs, but on the same token, we were responsible for our own individual truck and keeping our truck up to stock, which we did in various ways. Mr. Gajewski did call directly to supply and have whatever we requested sent up, but there were many times when -- what they would generally do is thay had a big - I don't mean to refer to it as a garbage bag, but that's what it looked like - it's a big cellophane bag, and they put your name or truck number on that and that would be left down at our garage where we brought our truck on Friday night, and then on Monday morning we'd pick up the garbage bag of supplies and take it back with us. On the interim weekend, maintenance was performed on our trucks. Good housekeeping meant a clean truck, and that meant washed outsides. We tried, as often as feasibly possible, to get the truck back on Friday night so it could be washed. And the oil was also changed in them on occasion. I'm not going to say every time I neede an oil change that it was changed in the Wausau Garage, but there were several occasions when this was done. I was reprimanded one time for not bringing the truck back because you're expected to do -- I don't know, it was quite a while back -- but I believe at that particular time we were in Tomahawk and we didn't bring -- I had come back by some other means -- I don't even know how -- and the truck was left up there, and Monday morning we were expected to go to a different job site and the truck wasn't there, and we were reprimanded verbally for not bringing that back to Wausau. On that occasion we
539 came to the Wausau Garage early to go back to Tomahawk, the supervisor was there and he says, "Well, I got a new job assignment for you today," and whatever it was I don't remember -- I believe it was to work in the Wausau area -- and I said, "I don't have my truck," and he said, "Well, why don't you have your truck. You're supposed to bring it back," and then I had to explain why.

MR. KARAU RECALLED - CUMULATIVE N.P.

544 NO CROSS EXAMINATION. DAVID HUSNICK RECALLED. DIRECT EXAMINATION BY MR. RADER.

We had two separate cutter crews and most of our individuals were from Marshfield and Merrill, so any resupplying of the trucks that was needed, it was usually called into Wausau, and these supplies were

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545 put into these so-called plastic bags and they were left off at the garage, and I picked these up for the crew, for the most part, and I carried supplies for two or three different people up to the areas where we were working. I routinely did this on interim weekends. Our supervisor had a cleanliness policy the same as the rest did, and whenever possible we dumped our garbage into the dups at these various locations, but we were informed that we were not to put anything of copper, or any old phones, or ringers, or anything in the dump; these were left in the truck and they were returned on Friday evening to the Wausau Garage where they were unloaded, and other than that, the vehicles were gassed and oiled and so forth on different occasions at Wausau. If a truck needed major repair, I would drive it to Wausau and if someone didn't need their truck I took their truck and returned with it on Monday morning. The maintenance needed on my truck was then performed during the following week. I don't recall ever having been reprimanded for not returning my truck to Wausau.

547 MR. GAJEWSKI'S DEPOSITION PART READ ADVERSELY INTO RECORD.

The lodging allowance paid the employee to stay over each night is $11.00 and $9.00 allowance for three meals. If an employee elected to drive back and forth with his own car, he would have to take the $6.00 per diem allowance and he would lose the $19.00 meal and lodging allowance during the week.

548 PLAINTIFF RESTS. TESTIMONY CLOSED.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1669

Anthony Fox, Dale Kremsreiter, Michael Schedlbauer, John Luedtke and Martin Detterming, for and in behalf of themselves and other employees similarly situated,
Petitioners,

vs.

General Telephone Company of Wisconsin, a Wisconsin corporation,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

CLARIFICATION OF QUESTIONS INVOLVED

Does the decision of the Wisconsin Court of Appeals, District III, as reported in *Fox v. General Telephone Company of Wisconsin,* 85 Wis. 2d 698, 271 NW 2d 161 (1978) decide a federal question of substance not theretofore determined by this Court; or has the Wisconsin Court decided it in a way probably not in accord with applicable decisions of this Court?

CLARIFICATION OF STATEMENT OF THE CASE

There are forty-two Petitioners in the instant action. All are employed by the Respondent General Telephone Company of Wisconsin (GTW) in various capacities, i.e. Installer-Repairman, Cable Splicer, CO&E Installer or Lineman. All are represented by the Communications Workers of America (CWA), a labor union; and all were employed by the Respondent at the times in question pursuant to the terms of a collective bargaining agreement, dated January 27, 1974 (Petitioners' Exhibit 45) entered into by and between GTW and CWA.

Prior to January 27, 1974, the payment for travel time was governed by the provisions of the GTW-CWA Agreement, dated March 9, 1973. (Petitioners' Exhibit 46, Article III, set forth at Petitioners' Brief at pp. 6-7) The 1973 Agreement provided that GTW employees would be paid for their "... travel time from the designated reporting center to the job and travel time returning to the designated reporting center." Under the 1973 Agreement, Petitioners would leave their designated reporting centers, e.g. Wausau, at the commencement of their working day on Monday and travel to the outlying job site; and at the end of the workweek, Petitioners would leave the job site on Friday so as to return to the designated reporting center at the close of their workday at 4:30 or 5:00 o'clock p.m. (R. 427) Petitioners were paid for such travel time.

The 1973 Agreement treated travel time to Company schools differently than travel to and from job sites. The Agreement provided that employees traveling to Company schools "... will

travel on Company time for the initial trip to the school and the last trip from the school." (Section 4 of Article III, Petitioners' Exhibit 46 at p. 70; Petitioners' Brief at p. 7) If a GTW employee attended a Company school for more than one week in duration, the employee would be paid for his travel time for the initial trip to the school and the last trip home from the school. However, he would not be paid for travel time on the interim weekend. (R. 3)

An interim weekend occurs when the employee works at a particular job site or attends a school for more than one week, i.e. when the employee leaves the job site or school on Friday and knows he is to return to the same job site or school on the following Monday. (R. 2)

Effective January 27, 1974, GTW and the CWA entered into a new labor agreement. With respect to the payment of travel time, Section 4 of Article III of the 1973 Agreement was changed to provide:

> Sec. 4. Employees traveling to Company schools or *a job site* within the operating area of the Company will travel on Company time for the *initial* trip to the school or *job site* and the *last* trip from the school or *job site. Transporatation will be provided by the Company ... Employees will travel on their own time and expense.*
>
> (Exhibit 45, Article III at p. 75; Petitioners' Brief at p. 7; Emphasis supplied.) Sections 1, 2 and 3 of Article III of the 1974 Agreement are identical to Sections 1, 2 and 3 of the 1973 Agreement. Only Section 4 was revised.

Mr. Gerald Kolb, GTW Personnel Director, was involved in the 1974 GTW-CWA contract

negotiations, and prepared the revised Section 4 of the travel time Article which was adopted by GTW and the CWA (R. 114) Revised Section 4 was adopted only after two prior proposals had been submitted to the CWA; but there was no agreement as to those proposals. (Exhibit 48, R. 434 to 439). Mr. Gerald Steffan, President of CWA Local 5572, went to Madison, Wisconsin, during the GTW-CWA negotiations in January of 1974, and prior to the time the revised Section 4 was discussed with the employees and prior to ratification of the 1974 Agreement (R. 449, 455 and 452). Mr. Steffan had a copy of the revised Section 4 prior to its ratification by the union membership (R. 450-451); and attended two meetings with the union membership to discuss and explain contract changes prior to ratification (R. 451, 453 and 454). GTW distributed a memorandum of all contract changes to the employees (R. 442-443). The 1974 Agreement was ratified by the employees in February of 1974. (R. 448).

After the 1974 Agreement took effect, GTW paid all employees for travel time on the initial trip to the distant job site and for the last trip from the job site; but only furnished transportation for the trips between the job site and designated reporting center on interim weekends. (R. 75, 427, 428, 440, 441, and 518). However, where an employee returned to the reporting center on Friday to report to a *new* job location the following Monday or to go on *vacation* the following Monday, he would be paid travel time for the return on Friday and the trip out again on Monday (R. 105). Where an employee was *directed* by management to return a vehicle to the reporting center to provide special equipment for another job site, he was paid travel time (R. 501, 506 and 507). If it should happen that

an employee was involved in an accident on an interim weekend trip, he would be paid wages for that period of time that he had responsibilities to do certain things with respect to the accident. (R. 502).

The truck used by the employee on the initial trip to the remote job site usually contained special equipment needed to perform the work at the job site (R. 73 and 75). This was usually the same transportation furnished to the employee to return on interim weekends, but not always (R. 75). Sometimes an employee would drive a line truck up but bring back a van on interim weekends (R. 364). When an employee utilized a truck or other vehicle to return to the home area on interim weekends, he was required to follow all Company safety rules in the operation of the vehicle, was required to park or leave the truck at the designated reporting center, and was required to return it to the job site the following Monday morning (R. 498, 515, 76, 77, 81 and 82). The safety rules required the employees "... to observe all rules of the road ... and to place safety cones in the front and rear of the vehicle whenever it was parked on a public street." (Respondent's Exhibit L-4, General Instruction No. 2, Sections 1.06 and 4.03). Further, the truck was required to be returned to the designated reporting center, and all tools and equipment were to remain with the trucks at all times for security reasons (R. 498).

Warren Phillips, GTW Fleet Coordinator, was the supervisor of the Company garage in Wausau; and he was responsible for a crew of mechanics and garage men who repaired and maintained all Company trucks. (R. 480). The garage facility in Wausau was not operated or staffed on Saturday or

Sunday of each week. (R. 483). During those days no Company trucks are repaired, restocked, equipped, washed or even gassed. (R. 483-485). The trucks simply remain where they have been parked. The only time the trucks were gassed would be on Friday, prior to the time the last garageman ended his shift at 9:00 p.m., or early on Monday when the garageman started his shift. (R. 485). The trucks would be gassed *only* if the employee-driver requested that the truck be gassed by turning down the gas tag on the truck visor. (R. 485). Also, each of the Petitioners are issued a Company credit card which is to be used by them to pay for the gassing and the repairing of GTW trucks. (R. 445).

It was not necessary that an employee return to his home area on the interim weekend and, in fact, there were times when he would remain at the remote site over the interim weekend. (R. 103). While GTW provided the employee with a vehicle to drive on interim weekends, no employee was required to return to his home base. He had other options available to him. (R. 440, 431, 432 and 433). If the job site was more than three hours away from the employee's reporting center, the employee could: (1) elect to receive a board and lodging allowance and stay over the weekend at the job site; (2) if the employee had been using his own personal vehicle to commute, he could return to the reporting center and receive a per diem travel allowance; or (3) elect to use a Company vehicle to return to the reporting center and travel on his own time. (R. 372; R. 17). If the job site was less than three hours away from the reporting center (and it is conceded by the parties that all of the trips in question fall within this classification), the employee could: (1) elect to stay over the weekend at the job site, but at his own expense; (2) if the

employee had been commuting in his own personal vehicle, he could simply return to the reporting center on his own time and expense; or (3) elect to use a Company vehicle to return to the reporting center and travel on his own time. (R. 17). All of the Petitioners elected to use a Company vehicle for travel on interim weekends.

On occasion a truck would be resupplied while at the home site over the interim weekend (R. 545); but, if the employee was directed by management to take equipment to a remote location, he was paid travel time (R. 506). Normally supply units brought supplies to drop points in the work area during the week (R. 52). Petitioners assert that they "routinely" picked up supplies in a "plastic bag" on the weekend to return it to the job site. (Petitioners' Brief at p. 10). However, the record indicates that only one of the forty-two Petitioners ever picked up supplies in a plastic bag, and that he did not specify on which interim weekend this occurred. (R. 545).

Based upon the evidence presented, the Wisconsin Trial Court (Circuit Court for Marathon County) held that the language of Article III of the 1974 Agreement did not entitle Petitioners to compensation for travel time on interim weekends; and that such travel in GTW vehicles was for the "convenience" of the Petitioners. A copy of the Trial Court's decision is set forth in the Respondent's Appendix to this Brief.

ARGUMENT

In support of their request that this Court review the decision of the Wisconsin Court of Appeals, District III, Petitioners argue that the decision is contrary to the provisions of the Fair Labor Standards Act (29 USCS §207 and §216); and

that the decision is contrary to the express contractual provisions contained in the GTW-CWA Agreement of January 27, 1974. Under 28 USCS §1257 (3), a final judgment of the highest state court may be reviewed "... where any title, right, privilege or immunity is ... claimed under the ... statutes of ... the United States." Not just any claim of right is reviewable on certiorari. Rather, a federal question of substance must be presented. See Rule 19, United States Supreme Court; and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 US 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). Since the judicial construction of Article III, Sections 1 and 4 of the GTW-CWA 1974 Agreement in and of itself does not involve a federal question, the concern is whether or not a federal question of substance is presented under the FLSA in this Petition for Writ of Certiorari.

I. The Wisconsin Decision Is In Accordance With 29 USCS §254 (a) And Applicable Decisions Of This Court, And Other Federal Courts.

A. Only travel time which is a necessary and indispensable part of an employee's principal activity or activities which the employee is employed to perform, is compensable under 29 USCS §254 (a).

The FLSA requires time and one-half for work over forty hours per week with certain activities being excluded. One such exclusion is found in the Portal-to-Portal Act of 1947 which provides in relevant part:

29 USCS §254 (a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or *traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and*

(2) Activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

The FLSA is the sole guide as to the compensability of an incidental activity, regardless of its nature, if it occurs during the workday proper *or if it is integrated with the principal duties and occurs before or after the principal duties are performed.* See 29 CFR, Sec. 790.5 to 790.8. The Portal Act makes nonintegrated activities occurring before or after the workday noncompensable, unless compensation is required by contract, custom or practice.

Turning to the question of whether or not travel time is working time under the FLSA, the principles which apply in determining working time depend on the *kind of travel* involved. 29 CFR,

Sec. 785.33. The following provisions from 29 CFR relate to the instant controversy:

Section 785.38. Travel that is all in the day's work. Time spent by an employee in travel *as part of his principal activity,* such as travel from job site to job site *during the workday,* must be counted as hours worked.

Section 785.41. Work performed while traveling. Any work which an employee *is required to perform while traveling must* of course be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

(Emphasis supplied).

Time spent in travel as part of an employee's "principal activity" is compensable time, regardless of when it occurs. As to the principal activities themselves, the test of compensability is that as laid down by this Court — that the term "principal activity or activities" embraces all activities which "... are an *integral* and *indispensable* part ..." of a principal activity. *Steiner v. Mitchell,* 350 US 247, 100 L.Ed. 267, 76 S.Ct. 330, 335 (1956); Emphasis supplied.

In accordance with this Court's decision, the Federal Wage-Hour Administrator has defined "principal activities" in 29 CFR as follows:

Section 790.8. "Principal" Activities ... (a) ... *The "principal" activities referred to in the statute are activities which the employee is "employed to perform";* they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act....

***

(b) *The term "principal activities" includes all activities which are an integral part of a principal activity....*

***

(c) *Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance....*

(Emphasis supplied).

The above established the legal context in which the following question was presented for resolution before the Circuit Court for Marathon County, Wisconsin (the Trial Court) and on appeal to the Wisconsin Court of Appeals, District III:

> Was the Appellants' travel time on interim weekends a part of their principal activity, that is, a necessary and indispensable part of a principal activity, which the Appellants were employed to perform?

The resolution of this question, by necessity, depends upon the facts and circumstances of each particular case. *Steiner v. Mitchell,* 350 US 247, 100 L.Ed. 267, 76 S.Ct. 330, 335 (1956); *DA & S Oil Well Servicing, Inc. v. Mitchell,* 262 F2d 552, 554-55 (10th Cir. 1958); and 29 CFR Sec. 785.33. The Wisconsin Trial Court found that the Petitioners' travel time on interim weekends was not a necessary and indispensable part of the activity

the Petitioners were employed to perform, and that such travel in GTW vehicles was for the "convenience" of the Petitioners. (A-R.p. 107). Findings of Fact must be sustained unless they are *clearly erroneous* and *contrary* to the *great weight* and *clear preponderance* of the evidence. *Stevens Const. Corp. v. Carolina Corp.*, 63 Wis. 2d 342, 217 NW2d 291 (1974) and *Anderson v. Federal Cartridge Corp.*, 156 F2d 681, 684 (8th Cir. 1946).

B. The Wisconsin decision correctly held that the petitioners performed no work of consequence for GTW while engaged in traveling.

Petitioners argue that the decision of the Wisconsin Appellate Court is contrary to the principles of law enunciated in the cases of *Smith v. Superior Casey Crews*, 299 F. Supp. 725 (E.D. La. 1969), *Secretary of Labor, U.S. Dept. of Labor v. E.R. Field, Inc.*, 495 F2d 749 (1st Cir. 1974), and *Dunlop v. City Electric, Inc.*, 257 F2d 294 (5th Cir. 1976).

The *Smith* case, supra, did not involve any application of the Portal-to-Portal Act to travel time inasmuch as the Court found that the employer and employees "... had agreed that the employees were to be paid ..." for their travel time. Id at p. 731. Under 29 USCS §254 (b), travel time to and from the actual place of performance of the principal activity or activities which an employee is employed to perform, is not compensable under the FLSA, unless there is a custom, contract or practice in effect between the parties which requires such payment. 29 USCS §254 (a) and (b). Therefore, the question of whether or not the

plaintiffs' travel time was a necessary and indispensable part of their job activities was never reached in *Smith* because there was an agreement requiring compensation. Neverthless, the Petitioners cite the *Smith* case for the proposition that whenever an employee is under the supervision or control of an employer, compensation is required regardless of the activity engaged in. However, the case does not stand for that proposition. In *Smith,* the employer deducted from compensated hours at the job site, an amount equal to sleeping and lunch time on the theory that there was an implied agreement with his employees permitting this. The Court, in reviewing the evidence, found no such agreement, either express or implied. Specifically, the employees were "... completely under (the employer's) direction whenever they were on the job site..." even when they were sleeping or eating. Id at p. 730. This fact was inconsistent with the assertion by the employer that there was an agreement permitting such deductions.

Petitioners also rely on *Dunlop v. City Electric, Inc.*, supra, in support of the proposition that whenever an employer receives *any* benefit from any activity or activities of an employee (regardless of whether or not the activities are a necessary and indispensable part of a principal activity which they were employed to perform), the employee is nevertheless entitled to compensation for his time. In *Dunlop,* supra, the Circuit Court was confronted with the following factual situation: Employees arrived for work approximately twenty to fifteen minutes prior to the beginning of their workday at 8:00 a.m. During this pre-8:00 a.m. period, the employees filled out daily time sheets and material requisition sheets; loaded and unloaded trucks with

materials needed at the job site; and fueled the trucks. The Secretary of Labor argued that the pre-8:00 a.m. time spent by the employees was compensable under the FLSA; and the employer denied liability relying on the Portal-to-Portal Act. The District Court found for the employer and the Secretary appealed. On appeal, the Circuit Court discussed the provision of the Portal-to-Portal Act applicable to the case at bar:

> By enacting §4 (a) (2) of the Portal-to-Portal Act, Congress relieved employers from back wage liability under the F.L.S.A. for time spent by their employees in "activities which are preliminary to ... [their] principal activity or activities" and which occur "prior to the time on any particular workday at which [the] employee commences ... such principal activity of activities." The use of the phrase "activity or activities" was not inadvertent. The legislative history and the administrative interpretations of the Portal-to-Portal Act support the view that the phrase "activity or activities" was used to dispel the notion that any activities not inextricably tied to a single predominant principal activity could be considered non-compensable.
>
> * * *
>
> *This directive to construe liberally the terms "principal activity or activities" to encompass "any work of consequence"* was reiterated by the President in his Message to Congress on Approval of the Portal-to-Portal Act *and has been followed by the majority of courts interpreting the two statutes ...*

> *... The exemption was not intended to relieve employers from liability for "any work of consequence performed for an employer" (Secretary of Labor v. E.R. Field, Inc.,* 1 Cir. 1974, 495 F. 2d 749, 751), *from which the company derives "significant benefit". Cherup v. Pittsburgh Plate Glass Company,* N.D. W.Va., 1972, 350 F.Supp. 386, 391, aff'd mem., 4 Cir. 1973, 480 F. 2d 921, cert. denied, 1973, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed. 2d 474. Nor was the exemption to apply to work "performed ... before or after the regular work shift ... [as] an integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell,* 1956, 350 U.S. 247, 256, 76 S.Ct. 330, 335, 100 L.Ed. 267, 273.
>
> 527 F. 2d 394, 397-398.
> (Emphasis supplied)

Simply, the Portal Act does not cover "any work of consequence performed for an employer." 29 CFR §790.8 (a). See *Mitchell v. King Packing Co.,* 350 US 260, 76 S.Ct. 337, 100 L.Ed. 282 (1956) and *Secretary of Labor, U.S. Dept. of Labor v. E.R. Field, Inc.,* supra. Therefore, the correct test is *not* whether the employer receives a benefit; but whether or not work of consequence was performed for the employer.

In this regard, the Wisconsin Court of Appeals noted:

> ... However, employer benefit, not requiring any employee time, would not under *Dunlop* make the preceding travel time compensable. *Benefit to the company, therefore, is not the sole consideration in determining compensability. To be compensable, the test is whether there*

was "work of consequence" performed "for the employer."

In this case the only work which conceivably was of consequence and performed for the employer was the transportation of the trucks from one location to another. The amount of time consumed in performing any of the other tasks such as removing waste from the trucks is not established in the record. However, it is clear that such time would be *de minimis* and would not qualify as work of consequence. *Regarding the transportation of the trucks, the trial court found this to be of no benefit to the company. This finding was based on the fact the trucks and equipment would have remained at the job site following the initial trip had they not been used for the sole convenience of the employees in traveling back and forth. Additionally, the employees were not required to drive the trucks and could elect to travel in their personal vehicles.* The trial court further found that the driving of the trucks was not motivated by any company purpose except the fulfillment of the company provided travel requirement in the collective bargaining agreement.

The driving of the trucks was therefore not an integral part of or indispensable to the principal activity or activities of the employees. These findings are not clearly erroneous and against the great weight and clear preponderance of the evidence...

Fox v. General Telephone Co.
85 Wis. 2d 698, 704 (1978)

The decision of the Wisconsin Court of Appeals is clearly in accordance with the legal principles established by previous decisions of this Court, as well as other federal courts, construing the FLSA and the Portal-to-Portal Act. At no time has there been a dispute as to the legal principles involved in this action. Rather, there has been a substantial factual dispute. However, this factual dispute has been resolved by the trier of facts. The reason the Petitioners have not prevailed in this action is simply that they have not met their burden of proof on the factual issues.

II. Section 4 Of The 1974 Agreement Provides That Travel Time On Interim Weekends Is Not Compensable, Thereby Rendering 29 USCS §254 (b) Inapplicable.

Under the Portal Act, an activity not otherwise compensable under the FLSA, is compensable if the employer has an agreement, custom or practice to that effect. 29 USCS §254 (b). Petitioners argue that the Wisconsin decision is contrary to the express provisions of Section 1 of Article III of the 1974 Agreement between GTW and the CWA. However, this argument does not involve a "federal question," but rather a question of judicial construction of a contract. In response to this same argument, the Wisconsin Court examined the provisions of Sections 1 and 4 of the Agreement (set forth on pages 6-7 of Petitioners' Brief); and noted;

> Plaintiffs argue they should be paid for interim weekend travel time under Sec. 1 regardless of Sec. 4. They claim the agreement is ambiguous and subject to the interpretation

that it left the previous travel time agreement unchanged. They also argue it would be a "subterfuge" to use Sec. 4 to exclude payment because the employees did not understand what the agreement said and thought they would be paid for interim weekend travel time. This argument incorrectly assumes that there is some duty on the employer to make sure the employees, represented by CWA, understood what the agreement meant.

We find that Sec. 4 specifically changed the former agreement in plain and unambiguous terms. It is our duty to construe the agreement as it stands giving effect to the plain meaning of the language used. The change in Sec. 4 of the 1974 agreement provides employees will travel on their own time. Travel time to and from job sites on interim weekends is therefore not compensable under the collective bargaining agreement. As to the "subterfuge" charge, the trial court found plaintiffs had not met the burden of proof necessary to estop the company from using Sec. 4 to deny travel time payments. This finding is not clearly erroneous and contrary to the great weight and clear preponderance of the evidence and therefore must be sustained on appeal.

Fox v. General Telephone Co.,
85 Wis. 2d 698, 700-701 (1978)

Petitioners assert that GTW had "the absolute duty" to provide clarifying terminology to more accurately describe Section 4 of the Agreement when GTW proposed to revise Section 4 during the course of the contract negotiations with the CWA. (Petitioners' Brief at page 15). No citation is given for this proposition; and such an assertion is

without any factual foundation. First, it assumes that the language contained in Section 4 is ambiguous, thereby requiring clarification. As the Wisconsin Court found, the language is clear and unambiguous, and expressly provides that travel time on interim weekends is not compensable. Secondly, to say that GTW had an obligation to provide clarifying terminology with respect to Section 4 evinces a lack of knowledge of the collective bargaining process. GTW negotiated the revisions to Section 4 in January of 1974 with the Bargaining Committee of the CWA as part of the negotiations for an overall labor-management agreement. GTW did not negotiate individually with the forty-two Petitioners, but with the exclusive bargaining representative of the Petitioners, i.e., the CWA. Indeed, to have negotiated directly with the Petitioners on this matter would have been an unfair labor practice under the National Labor Relations Act. If Petitioners were unclear as to the meaning of Section 4, it was *their sole responsibility* to seek proper clarification from their exclusive bargaining representative, the CWA, prior to the ratification of the 1974 Agreement.

III. The Petitioners Have Failed To Establish Any Factual Basis That They Performed Work Of Consequence To GTW In The Capacity Of Chauffers.

Finally, Petitioners assert that the word "transportation" as used in Section 4 of Article III of the 1974 Agreement is not equated with the word "vehicle". Rather, Petitioners argue that GTW must not only provide a vehicle, but a driver to transport the Petitioners on interim weekends. Consequently,

it is argued that Petitioners were performing services as a "chauffer". (Petitioners' Brief at page 16.) First, the foundation of the Petitioners' claim is that the travel time in question is travel time as a *driver,* rather than a passenger. As a result, the issue is *only* with respect to the *driving* time. Second, the 1974 Agreement provides only that GTW will provide transportation. It does not state that GTW will provide a *vehicle* and a *driver* to transport employees to the reporting centers on interim weekends. GTW's sole obligation was to provide a means of transportation for the employees to use on their own *if* they elected to return to the reporting centers. Nothing more was required. Third, the evidence does not indicate that Petitioners performed services as a "chauffer". There is *not* one shred of evidence in the entire record that passengers ever accompanied the Petitioner drivers on any of the interim weekend trips involved in this lawsuit. The record indicates that the Petitioners drove certain interim weekend trips; but the record is completely and totally *silent* as to whether or not there were passengers in the truck on those trips. In response to Petitioners' contention on this issue, the Wisconsin Trial Court noted:

> While not within the stipulated issues, Plaintiffs' Counsel has also raised the contention that the transportation required under section 4 is not a vehicle but rather a service, and the driver is, therefore, entitled to compensation. The complaint and the proof make it abundantly clear that each of the numerous Plaintiffs is assigned a company truck. *There is no evidence* that any such truck ever became a bus carrying passengers specifically ...
>
> (A-R.p. 108; Emphasis Supplied)

CONCLUSION

No unique or substantial question of federal law is present in this Petition for Certiorari. Rather, any question that was present in this action was a factual one. Simply, Petitioners have not established a factual record in this action to support a finding that their travel time on interim weekends constitutes compensable time, not exempted by the Portal-to-Portal Act. For the foregoing reasons, it is requested that this Court deny the Petition For Writ of Certiorari.

Respectfully submitted,

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(Admitted to practice before this Court on October 16, 1978)

RESPONDENT'S APPENDIX
(Pertinent Parts Only)

1 DECISION OF THE CIRCUIT COURT FOR MARATHON COUNTY, WISCONSIN

This case was tried to the Court early in May, 1977, and the final brief was submitted toward the end of June. By order, dated February 12, 1977, entered on stipulation, the issues were specified as two: one, whether Plaintiffs' travel time on interim weekends was compensable under Fair Labor Standards Act (FLSA), under 29 U.S.C.A. 254 (b); and two, is the Plaintiffs' driving of Defendant's trucks on interim weekends between their designated headquarters and a job site located in another exchange area, productive work time under the agreement in force between Defendant and its employees.

This action is brought by a substantial number of employees of the Defendant seeking to recover pay for travel time after January 24, 1974. Both before and after that date the Plaintiffs were employed by the Defendant under working conditions agreed to between Defendant and Communication Workers of America (CWA). Prior to that date the Plaintiffs left Wausau at the commencement of their working day on Monday and travelled to the job site and at the end of the week left the job site so as to return to the Wausau
2 headquarters at the close of their work day at 4:30 or 5:00 o'clock. So in effect, they were paid for their travel to and from the job. After the new contract the Defendant required the employees on interim weekends to leave the job site at the regular close of work and to commence work on Monday at the job site at the regular beginning of work, and the

effect of this was that the employees had to travel on their own time without compensation. An interim weekend occurs when the employee works at a particular job site more than one week, i.e., when the employee leaves work on Friday and knows he is to return to the same job site on the following Monday.

The agreement, Exhibit 45, calls for grievance and arbitration procedures, however, this is not an action invoking either of those remedies nor is CWA involved as a party.

The parties agree that Article III, set forth on Pages 74 and 75 of the 1974 Agreement, covers the determination of travel time. The Plaintiff stressed the provisions of Section 1 as supporting their claim while the company stresses Section 4. Under the old contract, Article III provided as follows:

"TRAVEL TIME: Sec. 1. Time worked shall be considered to include travel time from the designated reporting center to the job and travel time returning to the designated reporting center.

"Sec. 2: When an employee travels from one job location to another in a conveyance supplied by the Company, such travel time will be considered to be the same as productive work time.

"Sec. 3: When an employee travels from one job location to another on a public conveyance, travel time outside of the normal scheduled hours generally will not be paid for; however, the Company will pay certain board and lodging expense incurred by the employee during such travel time.

"Sec. 4: Employees traveling to Company schools within the operating area of the Company will travel on Company time for the initial trip to the school and the last trip from the school."

3 It is conceded that the practice under the old contract was to pay employees for their driving time from the job site to the Wausau headquarters back and forth each week without regard to whether it was the final week or an interim weekend. It is also conceded that under the old contract employees were not paid for their travel time on interim weekends when they were attending school for more than one week.

The only change in the new contract related to Section 4, which in 1974 was changed to read as follows:

"Sec. 4: Employees traveling to Company schools or a job site within the operating area of the Company will travel on Company time for the initial trip to the school or job site and the last trip from the school or job site. Transportation will be provided by the Company for the interim weekend(s) unless the employee has elected the reimbursement option provided in Article XXIII, Section 1 (b). Employees will travel on their own time and expense."

Normally where there is a change — as in this case in Section 4 — and a later dispute as to the effect of the change, the Court would look with interest to the contention of each side as to what they claim was the intended change. The intended change as contended by the Defendant is quite clear, namely, that this placed interim weekends as

to job sites on the same basis as school attendance. So far as the Court can determine, the Plaintiffs take no position as to the intent of the parties to be accomplished by such change. Plaintiffs argue that Section 4 is not sufficient to change the rule as to interim weekends because of the plain provision of Section 1, and in any event, that the Defendant was involved in bad faith, had the duty to make sure that the employees understood the change, and not having done so, should be barred from enforcing Section 4.

The Court would apprehend that during a period of such bargaining an employer is under rather stringent limitations in its communication
4 with its employees and that the responsibility basically is upon CWA to explain and take up with the employees the terms of the agreement being negotiated. Apart from that, the Court finds that the Plaintiffs have not met their burden of establishing any such breach of duty on the part of the Defendant to invoke an estoppel as requested. The Court considers this a matter of interpreting the contract and the ordinary rules of interpretation apply. A change in Section 4 justifies the inference that it was not intended to leave the agreement as it was before, but rather to make some change. The general provision in Section 1 had, in the old contract, been limited by the language in Section 4 as to interim weekends relating to schooling. The addition of language pertaining to job sites in Section 4 in the new contract, can only be interpreted as meaning that the agreement intended the same interim weekend treatment for job sites as had been used for schooling. Plaintiffs construction of Section 1 requires interpreting Section 4 as useless or inexplicable.

Plaintiffs argue that the company position is inconsistent because if an accident happened the driver is placed on overtime. The only testimony in this regard from the Defendant was that in the event of an accident the driver would be paid for his time in assuming responsibility for the truck and presumably the accident investigation.

Plaintiffs also contend that in practical effect they were required to take the truck home on interim weekends because the option afforded them was financially unattractive. Options always involve a comparison between the advantages of two alternative courses of action. The options were afforded by the agreement negotiated by the Company and the CWA. Presumably the option would be less attractive as the distance became
5 greater, but this does not justify the Court in finding that there was no option.

The Court finds that the literal language of Article III in the new contract deprives the Plaintiffs of compensation for travel time on interim weekends.

This leaves the question of whether the Plaintiffs' travel time on interim weekends is compensable under the FLSA, it being conceded that if FLSA conflicts with Article III, that the Federal provision controlled. The briefs indicated that this issue requires consideration of whether the instant case comes under the exception as to "walking, riding, or traveling to and from the actual place of performance of principal activity or activities which such employee is employed to perform." The parties each stress Federal cases interpreting this particular provision which they contend support their respective positions. Plaintiffs contend that DA&S Oil Well Servicing vs.

Mitchell, 262 Fed. 2d, 552, is in point and supports Plaintiffs' position. Defendant cites Tanaka vs. Richard K. W. Tom, Inc., 299 Fed. Supp. 732, as in point and supportive of its position.

6 While the DA&S Oil Well Case did result in finding that the drivers were performing services essential to the principal activity, the Court feels that the holding in that case, as well as the Tanaka Case, enunciates principles which require the finding that the FLSA does not require the invalidation of Article III, and particularly Subsection 4. In the DA&S Oil Well case the Court said:

> "Under the circumstances of this case, if the trucks are used solely for the transportation of employees to and from their principal place of work, then we think the drivers are 'riding or traveling' within the exclusion of Section 4 of the Act. The employer is under no obligation to furnish such transportation and it is provided only for the convenience of the employees. No employee is designated to drive the pick-up. Each employee, including the driver, is free to take advantage of the convenience or to provide his own transportation. We hold that the driving of the trucks on which the units are mounted, and the driving of the pick-ups when used to transport necessary equipment, constitute activities which are an 'integral and indispensable' part of the principal activities of the employees during the driving, and such services are, therefore, compensable." Page 555.

Each case under the DA&S Oil Well Case must be decided upon its peculiar facts, and in that case the Court said, "It is true that driving a truck is a totally different type of activity from that performed by the driver employee at the well site."

The driving of the truck here is likewise a totally different activity from the work performed at the job site. Here the employee could elect to travel in his personal car, to stay at the job site area, or to require the company to furnish transportation. The fact that the transportation was in a truck which was loaded with equipment essential for the driver's work, was incidental. If the driver had elected a different option, the truck would have stayed at the job site ready for continuation of
7 work on Monday. The Court could not find that the return of the trucks to the Wausau garage was motivated by any company purpose except the fulfillment of the transportation requirement for the driver, and that the finding must be made that the principal purpose was the convenience of the employee in going back and forth. Reasonable rules made by the company relating to safety and security do not affect the conclusion that the driver is riding or traveling within the exclusion. Defendant's position was that if the driver were directed to bring a necessary piece of equipment on the following Monday, that he would be paid for the driving time, and this would be comparable to the holding in the DA&S Oil Well Case. But for our purposes, since we are dealing with no such transport of material but merely transportation of the driver employee each interim weekend, the DA&S Oil Well Case in effect holds that that is not covered, and this is likewise the holding of the Tanaka Case, 299 F. Supp. 732. The principal difference in the Tanaka Case is that the foreman driver was permitted to take the truck home rather than parking it over the weekend at a company garage.

The Court, as above indicated, feels that the facts in the DA&S Case and the Tanaka Case are close enough so that the principle in those cases (that where a truck was used primarily for transportation to and from their principal place of work, that it was provided for convenience of the employee) applies to the instant case. As in the Tanaka Case, the Plaintiffs were riding or traveling within the exclusion of the Portal to Portal Act.

While not within the stipulated issues, Plaintiffs' Counsel has also raised the contention that the transportation required under Section 4 is not a
8 vehicle but rather a service, and the driver is, therefore, entitled to compensation. The complaint and the proof make it abundantly clear that each of the numerous Plaintiffs is assigned a company truck. There is no evidence that any such truck ever became a bus carrying passengers specifically, although there was testimony by some of the Plaintiffs that they were not certain as to certain trips whether they drove or were a passenger in connection with adjusting their claim to demand compensation only as drivers. There is nothing in the history, nor in the wording of Article III which the Court finds to support the conclusion that Defendant, to comply with the requirement of transportation, must provide both a vehicle and a driver. The pattern was for each employee to have a vehicle assigned to him, and to hold as Plaintiffs contend in this respect, would make a nullity of the final sentence in Section 4. The Defendant is entitled to dismissal of the Complaint. Defendant may submit Findings of Fact, Conclusions of Law, to the Court, sending a copy to Plaintiffs' Counsel. The Court will withhold action on the proposed Findings for a period of five days after receipt to enable Plaintiffs' Counsel to submit any objections.